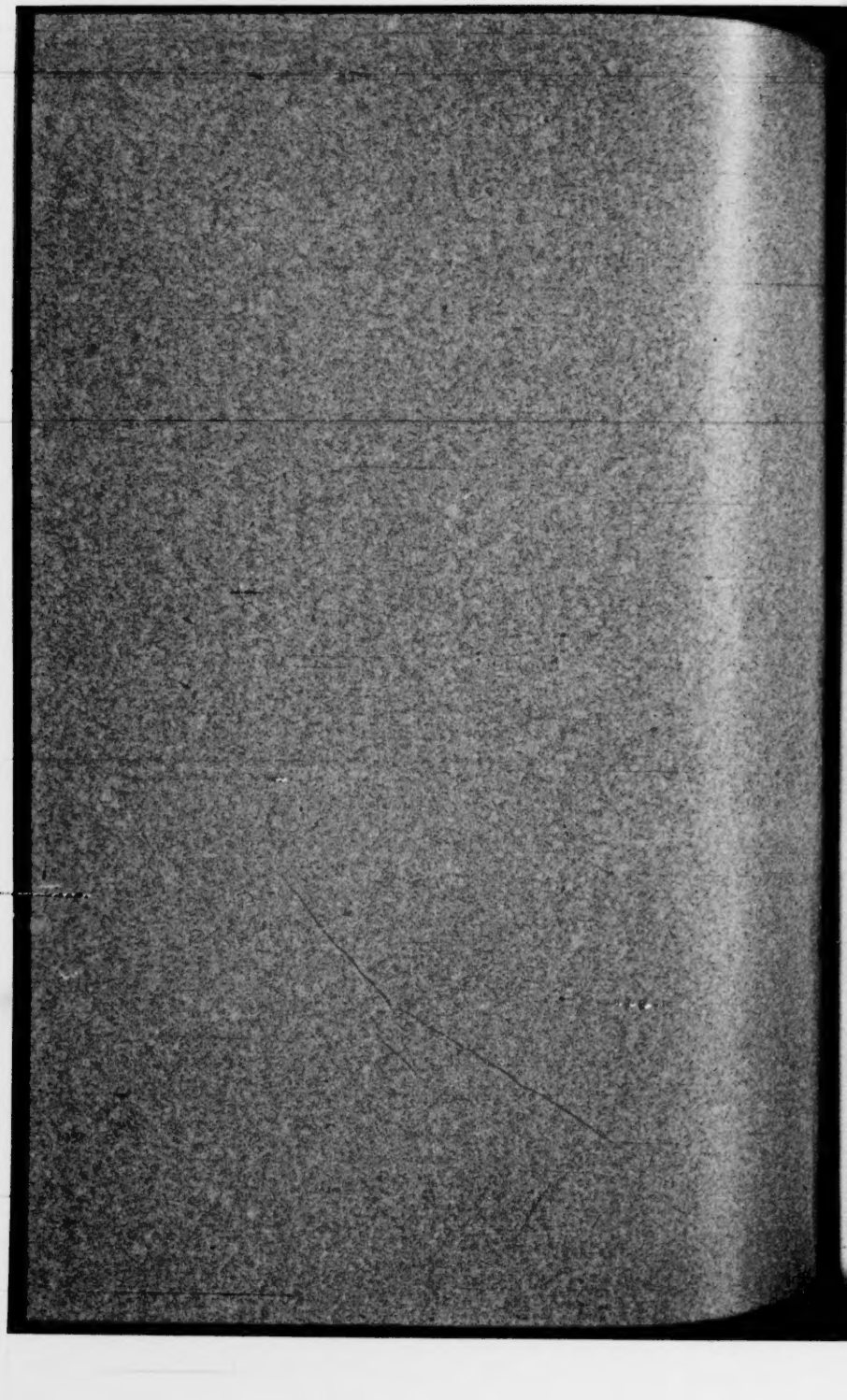


APPENDIX.

Opinions of Appellate Court.

First Opinion.

Louis H. Jacobs, *Appellant,*
vs.
Dora Marks, *Appellee.*

Appeal from the Circuit Court of Cook County.

Mr. Presiding Justice Freeman delivered the opinion of the court:

This was an action for deceit. The facts are substantially the same as in *People* v. *Jacobs, 72* Ill. App., 286, where they are stated clearly and at length. There is no material difference in the evidence between that case as it is stated in the opinion and the one now presented. We see no reason for reaching a different conclusion as to the facts from the view there expressed.

In the case before us, the question was submitted to the jury whether the contract of June 8, 1893, was signed on that day as claimed by appellant or in August following, as testified by appellee. The jury find specially that it was not signed June 8th. But this finding is upon evidence almost identical with that before the other branch of this court in the criminal case. It was there said: "We are of opinion that there is a decided preponderance of evidence that the contract of date June 8, 1893, was signed on the day of its date." We are forced to the same conclusion, notwithstanding the special finding to the contrary.

The fraud and deceit charged in the declaration are that defendant was a man of small means; that he represented that one Neufeld was a man of large wealth and means, the owner of the house he lived in in Chicago, worth $20,000, and of a factory at Chicago worth $60,000, and that he, Neufeld, would contribute $25,000 in cash to the new enterprise at its beginning, and that the defendant, Jacobs, would pay in $12,500, and that confiding in these statements appellee paid in $5,000, whereas in fact Neufeld did not own said property and did not "promise or intend to pay" in $25,000, nor did defendant intend to pay in $12,500 as he at the time well knew, and that the plaintiff was thus deceived.

Appellee subsequently drew out $1,000 which was returned to her by appellant, leaving the amount of her investment $4,000.

The allegation in the declaration that appellant was a man of small means, and that desiring to induce appellee to invest $5,000 in the enterprise, he wrongfully intending to deceive and defraud, falsely, deceitfully and fraudulently represented that Neufeld was a man of large wealth and means, the owner of the house he lived in at Chicago, worth $20,000, and of a factory in Chicago worth $60,000, charges a false representation as to existing facts, and it is the only such allegation in the declaration. It is alleged that the representations were made on or about the 15th day of June, 1893. If the contract of June 8th was actually signed on that day, and, as we have already stated in our opinion, the evidence that it was so signed decidedly preponderates—then these alleged false representations were made *after* appellee had agreed with Neufeld and Jacobs to subscribe $5,000 for stock, and could have had no influence in inducing her to do so.

But this allegation as to Neufeld's wealth can hardly be considered as material by itself, and it is coupled with and made a part of the other allegation upon which appellee relied, according to her declaration and evidence, as to the representations that Neufeld and Jacobs would contribute the amounts stated to the new corporation. If Neufeld had actually made such contribution, the amount and value of his property would have been immaterial.

But these statements alleged in the declaration to have been made by Jacobs, but which appellee testifies were made by Jacobs and Neufeld, respectively, namely, that Jacobs *would put in* $12,500 cash and that Neufeld *would put in* $25,000 cash, were merely promissory.

In *People* v. *Healy*, 128 Ill., 9-15, it is said:

"In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud, and where false representations are relied upon, it is essential that they relate to some material existing fact or facts and not to the future intention of the defendant, which he may or may not perform."

And the court quotes from Kerr on Fraud and Mistake, 88:

"As distinguished from the false representation of a fact, the false representation as to a matter of intention, though it may have influenced a transaction, is not a fraud in law."

The falsity of these statements, even though the promise was not intended to be complied with, would not necessarily be proven by evidence tending to show that Jacobs and Neufeld did not at the time possess the means to enable them to put in that amount in cash. The intention might have been perfectly honest and based upon expecta-

tions of being able to raise the amount as needed from time to time. Neufeld's testimony tends to show that he was able to raise the amount agreed to be contributed by himself, and Jacobs appears from the evidence to have had nearly three-fourths of the amount agreed to be contributed by him. "It cannot be said that these representations were false when made, for until the proper time arrived and plaintiff refused to comply with them, it could not positively be known that they would not be performed."

Gage v. *Lewis*, 68 Ill., 604-615.

And in the same case it is said:

"A promise to perform an act, though accompanied at the time wih an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise, and if this be void he has no remedy."

Representations alleged to be false which the evidence in this case tends to show relate to a material existing fact, are testified to by Mrs. Marks as having been made when she turned over her certificate of deposit for the purpose of paying in her own contribution to the capital stock of the new corporation. She says she was informed by Jacobs that he and Neufeld were ready to put their money in and that Neufeld produced three papers, white and blue, one of which she thought looked like her certificate of deposit, and said: "Here is our money." If this evidence could justify the conclusion that Jacobs and Neufeld then and there falsely represented that they were about immediately to put in, the one $25,000 and the other $12,500, and that Neufeld had the money, his own and Jacobs', or its equivalent actually in his hands as an

officer of the company, and that thereby appellee was induced to pay in her contribution, being falsely led to believe that by so doing the capital would be fully paid up, and was based upon proper allegations in the declaration, a different case would be presented. But such is not the evidence. Appellee herself says that she understood the money of the others was to be paid in from time to time "just as the business required it." It is conceded that both Neufeld and Jacobs did put in money, and appellee's testimony as to what occurred on that occasion is entirely consistent with the view that the papers produced were certificates or drafts representing money of theirs, then contributed.

We are of opinion that the declaration fails to state a sufficient cause of action.

"A verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action."

C. & A. R. R. Co. v. *Clausen,* 173 Ill., 100-104.

Other questions are presented by counsel, but in view of what has been said, it is not necessary to consider them.

The judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Mr. Justice HORTON does not concur.

Second Opinion of Appellate Court.

Louis H. Jacobs, *Appellant,*
vs.
Dora Marks, *Appellee.*

Appeal from the Circuit Court of Cook County.

Mr. Justice Shepard delivered the opinion of the court upon the rehearing.

A rehearing was granted February 24, 1899, upon petition of appellee. The appellant has not availed himself of his right under the rules of this court to answer the petition, although the ten days allowed by the rule in which to make such answer have long since elapsed. We must, therefore, as is provided by the rules, consider the cause once more upon the record, abstracts, original briefs and the petition for rehearing. Our former opinion proceeded upon the theory that the facts appearing in this record were substantially the same as those set forth in the entitled criminal cause, *People* v. *Jacobs,* 72 Ill. App., 276, wherein Jacobs, having been convicted, was plaintiff in error and not defendant in error. But, upon further consideration, we think there is a material distinction in some respects between the facts of this case and of that one, and furthermore, that we should consider this case in a somewhat different aspect than was there presented because of the special finding of the jury in this case and not there existing, upon the controlling question of fact.

In response to a special request submitted to them by the appellant, the jury found that appellee did not sign a certain agreement between herself and the appellant and one Neufeld on the day of its date. Great stress is laid

in the opinion of the criminal case above referred to upon the there claimed fact that appellee did sign said agreement on the day of its date, which is the exact opposite of the fact as found by the jury in this case. The declaration here is for deceit by appellant in inducing appellee by means of false and fraudulent representations to her made by appellant to part with $5,000 of her money. It is averred "that the defendant (appellant) desired to join with one Nathan Neufeld in the business of the manufacture and sale of furniture at * * * and to incorporate a company for the purpose of carrying on said last enterprise; * * * that the defendant was a man of small means and was required by said Nathan Neufeld to furnish more money to the enterprise than the defendant had, and for that purpose was required by the said Neufeld to induce some third person to put money into the said enterprise who would agree to become one of the corporation for the purpose of carrying on the said scheme of manufacturing and selling furniture. * * * That the defendant, being anxious to join the said Neufeld in said scheme or enterprise, and being further desirous to induce the plaintiff to join with him and said Neufeld in said scheme for incorporation and the enterprise of sale and manufacture of furniture at * * * on or about the 15th day of June, A. D. 1893, wrongfully and injuriously contriving and intending to deceive, defraud and injure the plaintiff (appellee) in this behalf, falsely, fraudulently and deceitfully represented and asserted to the plaintiff that said Nathan Neufeld was a man of large wealth and means, the owner of the house he lived in at Chicago, which said defendant averred was worth $20,000, and the owner of a factory at Chicago, which said defendant averred was worth $60,000; that

said Neufeld would contribute $25,000 in cash as his share of the money to be put into the said corporation at its beginning, and that he, defendant, would pay into said corporation the sum of $12,500 and * * * the plaintiff, confiding in said representations and assertions of the defendant, at the request of the defendant, agreed to pay to said defendant the sum of $5,000 to be applied about the business of the corporation to be formed by plaintiff and defendant and Nathan Neufeld for the purpose of the manufacure and sale of furniture. * * * And the defendant by falsely, fraudulently and deceitfully pretending and representing to the plaintiff that the said false, fraudulent and deceitful representations of the defendant were true, caused the plaintiff * * * to pay to the defendant the sum of $5,000 for the purpose of becoming a member of the corporation to be formed * * * whereas in truth and in fact the said Neufeld did not own the said house he lived in, nor a factory in Chicago worth $20,000 and $60,000, respectively, nor did he own any real estate, house or factory, nor did the said Neufeld promise or intend to pay to the said corporation and enterprise the sum of $25,000 in cash, nor did the defendant intend to put into the said corporation and enterprise $12,500 in cash, as the defendant at the time of his making his said false and deceitful representations well knew. and the plaintiff further sayeth that the defendant by means of the premises * * * falsely and fraudulently deceived the plaintiff and induced her to become a member of the corporation formed of the plaintiff and defendant and the said Neufeld * * * and to take shares in the same, and thereby the said shares of stock in said corporation have become and are of no use or value to the plaintiff," etc.

The gist of the representations averred in the declaration and relied upon by appellee is not of what either Neufeld or Jacobs would do in the future—not that they or either of them would put money into the enterprise at some future time—but is as to Neufeld's present property and financial ability. It was the representation that Neufeld was then at the time the representations were made, a man of large wealth, the owner of the house he lived in, worth $20,000, and the owner of a factory worth $60,000 —present, existing and material facts—that constituted the false representations which induced appellee to contribute her $5,000 to the enterprise.

It is true the representations that Neufeld would contribute $25,000 and that Jacobs would contribute $12,500 were as to something to be done in the future by them, and if they were all that is relied upon, the declaration would fail to sustain the recovery. It was proper to state those facts in the declaration as a part of the history of the transaction, but the deceit relied upon does not depend upon them. They are important only in considering whether the representations as to the present ability were false and were material.

Appellee might readily believe that the future promises would be performed if she were assured of the present ability of Neufeld to perform them. To show to appellee his present ability to perform the future acts, the representations were made of his present ability, and were material representations. It was them that appellee avers she relied upon as true and was induced to put in her money because of, and they and their falsity and appellant's knowledge of their falsity at the time he made them were explicitly averred.

A declaration in an action for deceit that avers the mak-

ing knowingly of the false statement in relation to a matter material to the transaction, the reliance by the plaintiff upon the statement as true, and that plaintiff was induced thereby to act to his detriment and loss will, if sustained by proof, authorize a recovery.

Merwin v. *Arbuckle,* 81 Ill., 501.

Positive and direct proof of knowledge of its falsity by the one making the representation is not required, but may be inferred from other facts that are proved.

Hines v. *Richter,* 51 Ill., 299.

We regard the declaration as sufficient.

The false representations, the knowledge by the appellant that they were false, their falsity in fact, the materiality of the representations, the reliance upon them by appellee and the consequent damage, all sufficiently appear in the declaration.

The declaration avers the representations to have been made on June 15th, 1893.

The appellant introduced in evidence an agreement signed by Neufeld, the appellant, and the appellee, dated June 8th, 1893. If this agreement were signed by appellee on the date it bears, her contention that she entered into the enterprise relying upon the truth of the representations averred by her declaration to have been made on June 15th, must fall.

It is this agreement which the jury specially found was not signed by appellee on June 8th, 1893.

The day the agreement bears date the appellee was in Escanaba, Michigan, the place of its date, and she might physically have signed it at that time and place.

The appellee testifies that she did not sign the paper on the day it is dated, and names the day of signing it as August 22, 1893, and she details numerous circumstances in corroboration of her statement.

There is nothing in the paper of an intrinsic nature inconsistent with the fact of its being signed at either time.

Whether the evidence of appellee as to the date of signing the paper and the corroborating circumstances to which she testified, should or not prevail over the testimony of appellant and the Michigan lawyer, both of whom testify it was signed in Escanaba on the day it bears, is difficult to say. The circumstance that the Michigan lawyer, who was also a notary public of that state, took the acknowledgment in Chicago of the execution by these parties and Neufeld of the incorporation papers filed, with his certificate of acknowledgment in the office of the Secretary of State of Michigan, when, as he testified, he had not authority as notary public to take acknowledgments out of the county in Michigan for which he was appointed, may have materially discredited the weight of his testimony in the minds of the jury. The further fact that Neufeld, who was present at the interviews on June 8th and on August 22d, who testified in the case, was not questioned as to the time or place of appellee's signing the paper may also have had weight in the minds of the jury. If such circumstances were given much weight by the jury, and they were entitled to be considered, the jury had a sufficient basis for their finding in appellee's favor upon the fact of when the paper was signed. As between appellee and the appellant, the jury might well have believed her in preference to him. A party who takes advantage of a confiding friend is quite likely to be discredited when he undertakes by his mere word to justify his conduct.

The special finding is in all respects consistent with the general verdict, and there is no such preponderating weight of evidence against its correctness as to justify us in disregarding it.

Appellant contends that the appellee is materially contradicted in material respects by her own testimony given in an attachment suit brought by her against the corporation in the courts of Michigan. The record in this case does not show any such contradiction. Upon the trial, appellant's counsel asked appellee if certain questions were not put to her upon the trial of the suit in Michigan and if her answers thereto were not as repeated to her. Her answer to the question which was put to her (embodying in one question what purported to be several questions to and answers by her in Michigan suit) was: "It is over three years ago and I can't say just what I said on the stand up there."

An argument based upon the assumption that she testified in this court that Neufeld and Jacobs were not to put in their part of the contribution to the capital of the corporation in a lump sum, but only from time to time as the business required it, is valueless.

The only evidence in this record of any testimony given by appellee in the Michigan suit was the testimony of a stenographer who took shorthand notes of the testimony given in that case, and who, with such notes before him, testified in this case as to what her testimony there was. He, however, did not testify that he had any recollection of her testimony independently of his notes, nor that the notes truly represented her testimony, nor that the notes were in the same condition at the time of the trial as when taken down in the Michigan suit, nor

does it appear in what connection in that suit with other testimony there given her testimony if as stated was given.

The falseness in fact of the representations made to appellee by appellant, their materiality, the reliance of appellee upon them, believing them to be true, and her consequent loss, are too plainly established by the evidence to leave room for questioning the verdict upon the ground that the evidence in those respects fails to support it. The knowledge by appellant at the time of their making that as to Neufeld they were false is the only remaining material fact concerning which it may be urged there is room for doubt. But considering all the circumstances in evidence, including the particular ones that appellant had been in the employment of Neufeld for six or seven years just before in a responsible position and seemed, according to his testimony, to have possessed Neufeld's confidence concerning his business affairs, and the evidence that tended to show that Neufeld and appellant had previously entered into an agreement that appellant should have a salary of $3,500 per year from the proposed corporation if he would get appellee into the enterprise with her money, we may not say that the jury were not justified in finding this fact also against appellant.

Our conclusion is that upon the facts the verdict must stand.

But appellant contends also that there is material error of law in the record.

After appellant's demurrer to the declaration was overruled by the Circuit Court, he interposed besides a plea of general issue a special plea wherein it was set forth that

after the time at which the said false representations are alleged to have been made, appellee brought a suit in Michigan against the corporation that was formed involving the same subject-matter of this suit; that jurisdiction of the parties and subject-matter was acquired in that suit and that thereafter a settlement of said cause was come to, and before this suit was begun the Michigan court entered of record in that cause an order as follows:

"This cause having been settled it is hereby discontinued by consent of both parties without cost to either party."

To such several pleading, the appellee filed a denial of its truth by replication and upon the issue made upon the plea, evidence was heard and instructions given, with the result of a verdict adverse to the truth of the plea.

Appellant insists that even if the subject-matter of the plea was immaterial, appellee made it material by replying to it, and made the result of the case depend upon the determination of the issue upon the plea. Possibly, but the issue upon the truth of the plea was found against him. It is also insisted that under the evidence upon the issue presented by the plea and replication, the jury should have been instructed, as was requested, to find for appellant. It would have been manifestly improper for the court under the evidence, including the written agreement entered into as the basis for discontinuance of the Michigan suit, to have given the instructions that were offered and refused concerning the legal effect of the settlement of the Michigan suit. The court did instruct the jury at appellant's request in respect to the Michigan suit and settlement as follows:

"You are instructed that if you find from the evidence

that the plaintiff herein instituted a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture and Lumber Company, for the purpose of recovering the $4,000 involved in the suit now before you, and that she made a settlement of this case with the defendant therein or any one else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant."

Such instruction was, to say the least of it, all that the appellant was entitled to in respect of the matter covered by it. To have gone further, as the court was requested to do, and instruct the jury that under the evidence before them they should find a verdict for the appellant, must have been most manifest error, the evidence being considered.

We cannot follow appellant's argument that the discontinuance of the Michigan suit amounts to a *retraxit* in practice and constitutes a bar to this action further than to agree with him as to the legal effect of a *retraxit* as between the parties to a suit and that it differs from a nonsuit and also from a nolle prosequi.

The argument is without force when applied to the evidence introduced under the issue that was made upon the plea. The written agreement alone under which the suit was discontinued dissipates the force of the contention.

The point is made that the attachment writ in this case should have been quashed for non-compliance with the statute in the manner of suing it out. We will not prolong our opinion by a discussion of the question. The alleged error in such regard was not given among the reasons filed in the Circuit Court as grounds for new

trial, nor was it included in the single ground of variance on which the motion in arrest of judgment was based. We have, however, considered the question upon its merits sufficiently to conclude that there was not any material error committed in respect of it.

Upon a consideration of the whole record, the judgment is right and should be affirmed.

AFFIRMED.

Mr. Presiding Justice FREEMAN dissenting.

Opinion of Supreme Court of Illinois.

Louis Jacobs v. *Dora Marks.*

Per Curiam: This was an action for deceit, brought by Dora Marks, against Louis Jacobs. The plaintiff sued out an attachment in aid. The defendant appeared and pleaded to the declaration, to which replications were filed, and on a trial the plaintiff recovered a verdict and judgment for $4,000, which was affirmed in the Appellate Court. Section 31 of chapter 11 of the statute provides: "That in all actions of trespass and trespass on the case, before a writ of attachment shall be issued the plaintiff, his agent or attorney, shall apply to a judge of a court of record or a master in chancery of the county in which the suit is pending and be examined, under oath, by such judge or master concerning the cause of action, and thereupon such judge or master shall indorse upon the affidavit the amount of damages for which the writ shall issue."

The abstract shows that the defendant entered a motion to quash the attachment, "on the ground that the court, before ordering attachment did not examine the plaintiff, her agent or attorney, on oath, in open court, as to the character or nature of her case; and the clerk had no authority to issue this attachment because the order does not recite that the said judge had examined the plaintiff on oath, etc., and because no order was ever issued by any judge of this court stating the amount for which attachment was issued." The court denied the motion. The statute does not contemplate that an examination should be made before a court in session, but merely that the

party desiring an attachment should appear before a judge or a master in chancery; and upon an application of that character, no record could well be made of the proceedings before the judge or master. Here it is conceded that the plaintiff appeared before the judge and made the application and the judge ordered the writ, but what examination the judge made does not appear. It will, however, be presumed in the absence of a contrary showing, that the judge heard such evidence and made such examination as the law required. We think the motion was properly denied. It is next claimed in the argument that the plaintiff, both in her declaration and evidence, failed to make out a case. As to the declaration, it appears from the record that the defendant demurred, and after the demurrer was overruled pleaded over. It is a well settled rule that a plea to the merits after a demurrer has been overruled is a waiver of the defects in the declaration. If the declaration was insufficient and defendant desired to avail of such insufficiency he should have abided by the demurrer. Having failed to do so he cannot now complain of the declaration. It is true, there was here a motion in arresst of judgment; but this was not predicated on the ground that the declaration failed to state a cause of action, but, as appears on page 85 of the abstract, the motion was based on the ground that there was a material variance between the declaration and the evidence. If there was a variance and the defendant desired to avail of the objection, he should have objected to the introduction of the evidence when it was offered on the trial, and the variance should have been pointed out in order that the plaintiff might, if she desired, obviate the difficulty by amendment. He could not wait until the trial was over, and then avail of a variance on motion in arrest of judgment.

As to the evidence, upon an examination it will be found that it fairly tended to establish plaintiff's cause of action. Its sufficiency was settled by the judgment of the Appellate Court and cannot be considered here.

After defendant's demurrer to the declaration had been overruled in the Circuit Court, in addition to a plea of the general issue he filed special pleas in which he set up in substance, that the plaintiff on or about the 4th day of December, 1893, instituted an action in the Circuit Court of Delta County, Michigan, against the Chicago Furniture and Lumber company, to recover said sum; that service was duly had upon defendant, which entered its appearance in the cause, and said court acquired jurisdiction of the parties to said cause and subject-matter thereof; that afterwards said plaintiff and defendant came to a settlement of said cause, and at a general term of said court, on July 25, 1894, the court entered the following order: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost, to either party." The plaintiff filed replication, taking issue on the facts set up in the pleas. Upon the issue formed, evidence was introduced by the respective parties, instructions were given to the jury, and a verdict was returned against the defendant on the issue presented. It is now claimed that the facts set up were a bar to plaintiff's action. A written contract was entered into between Dora Marks, the plaintiff, and the Chicago Furniture and Lumber Company, at the time the suit named in the plea was settled and discontinued, which was put in evidence on the trial. From that contract and the other evidence, it appears that the Furniture and Lumber Company never complied with the contract under which the suit was discontinued, and the plaintiff never recovered a single dol-

lar in satisfaction of her claim. If the plaintiff in the action had sued the Furniture and Lumber Company and recovered the amount of her damages, and had received satisfaction thereof, it is no doubt true that she could not recover for the same thing from another. But no such case was presented by the evidence.. Here, as the evidence showed and as found by the jury, there was no recovery by plaintiff of her damages and no satisfaction. The effect of the transaction between the plaintiff and the Furniture and Lumber Company was a mere dismissal of her action or an abandonment of her action as against the Furniture and Lumber Company, for which she recovered nothing in return, and we are aware of no principle upon which it can be held that the record in the Furniture and Lumber Company case can be treated as a bar to the present action.

It appears that the Circuit Court, on application of the plaintiff, advanced the cause for a hearing, and this is relied upon as error. The statute authorized the court, for good cause shown, to advance the cause, and the facts shown to the court were, in our opinion, sufficient to authorize the action of the court.

We find no error in the judgment of the Appellate Court, and it will be affirmed.

JUDGMENT AFFIRMED.